PREME COURT. U. S.

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No. 290

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

CROWN COAT FRONT CO., INC.,
Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

CROWN COAT FRONT CO., INC.,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Crown Coat Front Co., Inc., prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered in this case on May 14, 1968.

(a) OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, p. 11) is not yet reported. The opinion of the District Court (App., *infra*, p. 23) is reported at 275 F.Supp. 10.

(b) JURISDICTION

(i) The judgment of the Court of Appeals sought to be reviewed was entered May 14, 1968. Petition for rehearing was denied June 11, 1968.

(ii) The jurisdiction of this Court is invoked pursuant to the provision of 28 U.S.C. 1254(1).

(iii) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. 1254(1).

(c) QUESTIONS PRESENTED

1. Whether the running of the statutory limitation period on suits against the United States in the District Courts is tolled by a timely action in the Court of Claims.

2. Whether the United States is sovereignly immune from tolling.

3. Whether for a limitation statute to be tolled by concealment, fraud is necessary.

(d) STATUTORY PROVISION

Act of June 25, 1948, 62 Stat. 971, 28 U.S.C. 2401(a):

> "§2401. Time for commencing action against United States.
>
> "(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases."

(e) STATEMENT OF THE CASE

On May 14, 1956 petitioner contracted with the United States to furnish a specified number of canteen covers which were to be lined with mildew-resistant dyed felt meeting certain quantitative and qualitative specifications for mildew proofing. The Government, which was authorized to inspect materials to be used under the contract, tested and rejected certain samples of felt purchased by petitioner as deficient in the required contract quantities of DDDM[1] mildew inhibitor. Petitioner agreed to a price

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[1] 2.2' dihydroxy - 5,5' dichlorodiphenyl methane.

reduction, however, and was permitted to complete the contract. Final delivery, originally scheduled for October 11, 1956, was made on December 14, 1956. On March 20, 1959, the Government, which had theretofore concealed the nature of the test made, informed petitioner for the first time that its dyed felt samples had been rejected by a colorimetric test.[2] Contract final payment had long since been made and the *Changes* article of the contract providing for equitable adjustment upon change in specifications required that a claim *"must be asserted prior to final payment under this contract."* Petitioner thereupon claimed refund of prompt payment discounts erroneously taken; his claim was rejected by the contracting officer, on the ground of final payment. On appeal, the ASBCA on September 19, 1961 found final payment not to have been made, that prompt payment discounts had been taken after the prompt payment discount period had expired, and directed repayment to petitioner.[3] Thereupon, the way being cleared for *Changes* article relief, petitioner on October 6, 1961 filed claim for equitable adjustment with the contracting officer; the contracting officer denied

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[2] DDDM extracts from dyed materials are so stained that colorimetric comparison with a standard is impossible; dye bleeds and interferes with complete extraction of DDDm and with reaction: *Am Dyestuff Reptr* 34, 15-6 (Jan. 1945).

[3] *Appeal of Crown Coat Front Co., Inc.*, ASBCA No. 7096, 61-2 BCA §3157 (1961).

the claim, and petitioner's timely appeal was docketed at ASBCA 8090. Since final delivery was made on December 14, 1956 petitioner, being unsure whether it had a *"question of fact"* or a *"question of law"* or a mixed question of law or fact,[4] on December 12, 1962, filed action for damages in the Court of Claims.[5] Petitioner's action, based on the view of the Wunderlich Act, 41 U.S.C. 321-2, expressed in *Volentine and Littleton v. United States*, 136 Ct.Cl. 638, 145 F.Supp. 952 (1956), sought trial de novo. On February 28, 1963 the ASBCA denied petitioner's appeal,[6] ruling that petitioner's claim was under the *Changes* article and subject to the *Disputes* article. On June 3, 1963 *United States v. Carlo Bianchi*, 370 U.S. 709 (1963) explicitly overruled *Volentine and Littleton v. United States, supra*: 380 U.S. at 712. Petitioner was thereunder not entitled to trial de novo and was limited to judicial review of the administrative record at ASBCA 8090, *supra*. Petitioner, thereupon, brought this action in the District Court below at 63 Civ. 2281, on July 31, 1963 seeking judicial review and equitable adjustment, and on August 19, 1963 moved the Court of Claims to suspend its proceeding

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4 See *Some Notes on Court of Claims Practice*, Saul Richard Gamer, 2 Government Contracts Review 4, 12 (April, 1958).

5 *Crown Coat Front Company, Inc. v. United States*, Ct.Cl. No. 395-62.

6 *Appeal of Crown Coat Front Co., Inc.*, ASBCA No. 8090, 63-1 BCA §3681 (1963).

at 395-62 by virtue of such District Court action. The Government moved to dismiss on the merits on the ground that since plaintiff's action in the Court of Claims on December 12, 1962 was followed by the District Court action on July 31, 1963, the Court of Claims lacked jurisdiction under 28 U.S.C. §1500.[7] On September 20, 1963 the Court of Claims entered an order allowing the Government's motion to dismiss, without prejudice. The District Court below on January 29, 1965 dismissed the Suit below at 63 Civ. 2281, *supra*, as barred by the statute of limitations.[8] The Court of Appeals affirmed[9] on the ground that the cause of action first accrued no later than December 14, 1956, the date of the final delivery of the disputed canteen covers, and was therefore time barred by 28 U.S.C. §2401(a). Because of conflict with *Northern Metal Co. v. United States*, 350 F.2d 833 (3d Cir., 1965) ruling that the statute was tolled during the pendency of the administrative proceedings, this Court on October 10, 1966

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[7] The Government made the contrary contention and was sustained upon an exhaustive analysis of 28 U.S.C. §1500 in *Tecon Engineers, Inc. v. United States*, 170 Ct. Cl. 389, 349 F.2d 943 (1965).

[8] The District Court's opinion, per Ryan, Ch. J., not reported, appears in the Record, pp. 7-13, *Crown Coat Front Co. Inc. v. United States*, Oct. Term, 1966, No. 371, 386 U.S. 503 (1967).

[9] *Crown Coat Front Co., Inc. v. United States*, 382 F.2d 407 (2d Cir. 1966).

granted certiorari.[10] This Court then after briefs and argument, and noting the decision *Nager Electric Co. v. United States*, 177 Ct. Cl. 234, 368 F.2d 847 (Oct. 14, 1966) opinion per Davis, J., reversed[11] and in its opinion per Mr. Justice White concluded, 386 U.S. at 522, that if the claim filed by petitioner was a claim *"arising under"* the contract and was therefore subject to administrative determination, his right to bring a civil action first accrued when the ASBCA finally ruled on his claim, and his suit in the District Court was timely filed; but that the Government characterized the claim as a pure breach of contract claim which accrued no later than the date of contract completion; that the District Court had not decided this issue, nor did this Court; that the matter would be open on remand to the District Court, and if the claim were not within the disputes clause, the District Court might then determine whether it was time barred.

Upon remand, petitioner, which as the proceedings below indicate, had been uncertain, concluded that its claim was for breach of contract and moved to amend so

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[10] *Crown Coat Front Co., Inc. v. United States*, 385 U.S. 811 (1966): See *Crown Coat Front Co., Inc. v. United States*, 386 U.S. 503, 509 (1967).

[11] *Crown Coat Front Co., Inc. v. United States*, 386 U.S. 503 (1967).

as to thus claim.[12] Petitioner contended that the limitation period was tolled by the timely suit in the Court of Claims, *supra*, citing *Burnett v. New York Cent. R.R.*, 380 U.S. 424 (1965). The District Court denied the motion to amend, and dismissed the complaint as time-barred,[13] ruling that the United States possessed sovereign immunity from tolling (App., *infra*, p.34) and that the Government concealment of the colorimetric test it made upon petitioner's dyed felt, did not toll the statute since it was not fraudulent (App., *infra*, p.35). On appeal, the Court of Appeals for the Second Circuit on May 14, 1968 affirmed, approving the District Court's opinion that the limitation statute could not be tolled by reason of the sovereign immunity of the United States (App., *infra*, p.21) as well as that concealment must be fraudulent to toll the statute (App., *infra*, p. 20) and that petitioner should have urged the principle of *Burnett v. New York Cent. R.R.*, *supra*, decided April 5, 1965, when before Chief Judge Ryan of the District Court, whose decision was rendered January 29, 1965 (App., *infra*, p. 21).

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[12] Petitioner's belief was confirmed by *Len Co. v. United States*, 385 F.2d 438 (Ct. Cl., 1967), opinion by Davis, J. There was no change in the work called for, but only a delay in performance.

[13] *Crown Coat Front Co., Inc. v. United States*, 275 F.Supp. 10.

REASONS FOR ALLOWANCE OF WRIT

1. The Court of Appeals' determination that the limitation period was not tolled by petitioner's timely action in the Court of Claims is contrary to *Burnett v. New York Cent. R.R.*, 380 U.S. 424 (1965) and with *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965) and is in conflict with *United States v. Woodbury*, 359 F.2d 370 (9th Cir., 1966) and with *Berry v. Pacific Sportfishing, Inc.*, 371 F.2d 213 (9th Cir., 1967). The Court's statement (App., *infra*, p. 21) that petitioner should have raised this issue *"the first time around"* ignores the fact that *"the first time around"* was Chief Judge Ryan's decision of January 29, 1965 when petitioner could not have argued upon the authority of *Burnett v. New York Cent. R.R., supra*, decided April 5, 1965. This reason advanced by the Court of Appeals for not following *Burnett v. New York Cent. R.R., supra*, is clearly not a valid one.

2. The Court of Appeals' determination that the respondent is sovereignly immune from tolling[14] is contrary to *Honda v. Clark*, 386 U.S. 484 (1967) and with *United States v. Yellow Cab Co.*, 340 U.S. 547 (1951), and is in conflict with *Northern Metal Co. v. United States*, 350 F.2d 833 (3rd Cir., 1965) and with *Nager Electric Co. v. United States*, 177 Ct. Cl. 234, 368 F.2d 847 (1966).

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[14] App., *infra*, p. 21.

3. The Court of Appeals' determination that respondent's concealment of the colorimetric test it had made upon petitioner's dyed felt for mildew proof inhibitor content, did not toll the running of the limitation period, because not fraudulent,[15] is in conflict with *Spevack v. United States*, 390 F.2d 977 (Ct.Cl. 1968); with *Belton v. Traynor*, 381 F.2d 82 (4th Cir., 1967); and with *Louisville & Nashville RR v. Dispain*, 275 F.2d 25 (6th Cir., 1960).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should be granted.

EDWIN J. McDERMOTT

Attorney for Petitioner

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[15] App., *infra*, p. 20.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 317—September Term, 1967.

(Argued February 7, 1968 Decided May 14, 1968.)

Docket No. 31915

CROWN COAT FRONT CO., INC.,

Plaintiff-Appellant,

—against—

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before:

WATERMAN and FEINBERG, *Circuit Judges,*
and BARTELS, *District Judge.**

Appeal from a judgment of the United States District Court for the Southern District of New York, Walter R. Mansfield, *J.*, dismissing plaintiff's complaint as time-barred. Affirmed.

EDWIN J. MCDERMOTT, Philadelphia, Pa. (Charles J. Nager, New York, N. Y., on the brief), *for Plaintiff-Appellant.*

* Of the Eastern District of New York, sitting by designation.

ALAN G. BLUMBERG, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Lawrence W. Schilling, Assistant United States Attorney, on the brief), *for Defendant-Appellee.*

FEINBERG, *Circuit Judge*:

In 1956, the amount due plaintiff Crown Coat Front Co., Inc. on a contract with defendant United States was reduced by the sum of $270.01 out of a total contract price exceeding $60,000. This minor price adjustment, incredibly, has led to years of still unfinished litigation before the Armed Services Board of Contract Appeals, the United States District Court for the Southern District of New York, this court *in banc,* and the United States Supreme Court.[1] And now, in the latest phase of its dogged pursuit of its remedies, Crown Coat again appeals from a judgment of the United States District Court for the Southern District of New York, Walter R. Mansfield, *J.,* dismissing as time-barred its complaint for damages against defendant United States. For reasons set forth below, we affirm.

As a prelude to further discussion of this appeal, three factors must be stressed. First, a contractor suing the Government must ordinarily do so within six years from the date his right of action accrues. Second, there is a conceptual difference between so-called "disputes clause" claims and "breach" claims growing out of a contract with the Government. Although it is frequently difficult to tell

1 In addition to the proceedings discussed in this opinion, Crown Coat has litigated other issues under this and a related contract, see, e.g., *Crown Coat Front Co.* v. *United States,* 292 F. 2d 290 (Ct. Cl. 1961); *Crown Coat Front Co., Inc.,* 61-2 B. C. A. ¶3157 (ASBCA No. 7096) (1961).

into which category a specific claim falls,[2] at least this much can be said: "Disputes clause" claims are "redressable under specific contract adjustment provisions" and therefore subject to the disputes procedure set forth in the contract; "breach" claims are not. *United States* v. *Utah Constr. & Mining Co.*, 384 U. S. 394, 404 n. 6 (1966). Third, the prior opinion of this court sitting *in banc*, *Crown Coat Front Co.* v. *United States*, 363 F. 2d 407 (1966), still retains significance on certain issues decided therein even though it was reversed on other grounds.

With these points in mind, we turn to the facts of this controversy, which can be related substantially as they appear in the opinion of the Supreme Court, 386 U. S. 503, 507-08 (1967), but with important additions for matters the parties did not stress there. On May 14, 1956, Crown Coat contracted with the United States to supply a specified number of canteen covers which were to be lined with mildew-resistant felt of certain specifications. The Government, which was authorized to inspect materials to be used under the contract, tested and rejected certain samples of felt furnished by Crown Coat because they allegedly did not contain the contract quantities of mildew inhibitors. Crown Coat agreed to a price reduction of one-half cent per canteen cover, a total of $270.01, and was permitted to complete the contract with the rejected felt. Final delivery, originally scheduled for October 11, 1956, was made on December 14, 1956.

In March 1959, Crown Coat allegedly first discovered the nature of the tests which the United States had performed on the felt. Objecting to the use of such tests, Crown Coat filed a claim with the government contracting officer in

2 See, e.g., *United States* v. *Utah Constr. & Mining Co.*, 384 U. S. 394 (1966); *Len Co.* v. *United States*, 385 F. 2d 438 (Ct. Cl. 1967); *Nager Elec. Co.* v. *United States*, 368 F. 2d 847, 862 (Ct. Cl. 1966).

October 1961. Crown Coat contended that use of an improper test was a "change in contract specifications" under the "changes" clause of the contract,[3] entitling it to an equitable adjustment in the form of a refund of the price reduction and compensation for increased costs occasioned by substantial delay resulting from the Government's rejection of the felt samples. The claim was brought before the contracting officer as a disagreement on a question of fact within the meaning of the "disputes" clause of the contract,[4] which requires that administrative relief be exhausted. On February 21, 1962, the contracting officer denied the claim which had been submitted to him; within a week, Crown Coat appealed to the Armed Services Board of Contract Appeals, a further administrative step required for assertion of a disputes clause claim. As the expiration of six years from the 1956 final delivery date approached, the Board had not yet ruled. On December 12, 1962, just two days before the end of the six-year period, Crown Coat filed a complaint in the Court of Claims under 28 U. S. C. §1491, seeking $25,270.01 damages for breach of the contract by use of improper tests. Two months later, on February 28, 1963, the Board of Contract Appeals affirmed the contracting officer's decision.

On July 31, 1963, Crown Coat commenced the instant action in the United States District Court for the Southern District of New York pursuant to the Tucker Act, 28 U. S. C. §1346(a)(2). The complaint alleged that the Board of Contract Appeals decision was capricious, arbitrary and not supported by substantial evidence, and asserted that use

3 The actual "changes" clause employed in this contract does not appear in the record. The standardized version of a changes clause appears at 32 C. F. R. §7.103-2 (1967).

4 The contract's "disputes" clause is set out in the Supreme Court's opinion, 386 U. S. at 505 n. 1.

of improper and inaccurate tests entitled Crown Coat to an equitable adjustment under the contract's changes clause; the amount sought was $9,500.[5] At this point, therefore, there were then pending against the Government two actions growing out of the same transaction: one filed in the Court of Claims in December 1962, and the other filed in the district court in July 1963. The parties then returned to the Court of Claims. Because of the pendency of the district court proceedings, see 28 U. S. C. §1500, Crown Coat moved to "suspend" its action in the Court of Claims, and the Government moved to dismiss. In September 1963, the Court of Claims dismissed the action, without prejudice.[6]

The district court action was thus left standing alone. In that action, the United States, among other things, asserted that the suit was time-barred under 28 U. S. C. §2401 (a), because it was brought more than six years after it had accrued.[7] Chief Judge Ryan agreed and dismissed the action on that ground.[8] This court, sitting *in banc*, affirmed that dismissal in a five-to-four decision, 363 F. 2d 407 (1966). All nine judges agreed that Crown Coat's action

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5 Under §1346(a)(2), the district court's jurisdiction is limited to claims not exceeding $10,000. In order to invoke the court's jurisdiction, plaintiff therefore demanded judgment for "Nine thousand Five hundred dollars or such amount not exceeding Ten thousand dollars as the Court may deem just and equitable."

6 *Crown Coat Front Co.* v. *United States*, Dkt. No. 395-62 (Ct. Cl. Sept. 20, 1963).

7 Section 2401(a) provides:

> Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

8 *Crown Coat Front Co.* v. *United States*, No. 63 Civ. 2281 (S. D. N. Y. Jan. 29, 1965).

accrued on December 14, 1956, the date of the final delivery of the canteen covers by Crown Coat. The issue that divided this court was whether the administrative proceeding before the contracting officer and the Board of Contract Appeals tolled the applicable six-year statute of limitations; if it did not, the district court suit in July 1963 was not timely. The majority held that the statute was not tolled; the minority thought that it was. Thereafter, the Supreme Court reversed, 386 U. S. 503 (1967), but on an entirely different theory, and did not discuss the tolling question that had divided this court. The Court held that a disputes clause action does not even accrue until the end of the required administrative proceedings. Therefore, if Crown Coat's claim in the district court action was of that type, it was not barred by the statute of limitations. However, the Court added the following significant statement (*id.* at 522):

> The Government in its answer to the complaint, however, denied that the claim arose under the contract, characterized it instead as a pure breach of contract claim which accrued no later than the date of the completion of the contract. The District Court did not decide this issue; nor do we. This matter will be open on remand to the District Court. If the claim is not within the disputes clause, the court may then determine whether it is time-barred.

Thus, Crown Coat found itself back in the district court with an indication from the Supreme Court that if its basic claim was after all of the breach rather than the disputes clause variety, it might be untimely. Thereupon, for reasons best known only to it, Crown Coat moved to amend its complaint in the district court to assert a breach

of contract claim for $19,556.03. The Government consented to the change in the theory of the complaint. However, it contended that the statute of limitations clearly barred the breach action, since all nine judges of this court had ruled that the claim accrued in December 1956, more than six years before the action was filed in July 1963. Crown Coat replied, *inter alia,* that the action it had brought in the Court of Claims in December 1962, which was timely when filed,[9] tolled the statute of limitations. In any event, it urged the district court not to pass upon the statute of limitations question but to exercise its power to transfer the district court action to the Court of Claims under 28 U. S. C. §1406(c). That section provides:

> If a case within the exclusive jurisdiction of the Court of Claims is filed in a district court, the district court shall, if it be in the interest of justice, transfer such case to the Court of Claims, where the case shall proceed as if it had been filed in the Court of Claims on the date it was filed in the district court.

Crown Coat pointed out that if its amendment to increase the damages claimed was allowed, the district court would no longer have jurisdiction[10] and the case would be within the exclusive jurisdiction of the Court of Claims and, therefore, subject to transfer.

Judge Mansfield denied the damage amount amendment as not in the interest of justice. On the tolling issue, the judge reasoned that congressional consent to suit should be strictly construed as a waiver of sovereign immunity; he held that "Commencement of an action against the Gov-

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9 28 U. S. C. §2501 provides a six-year statute of limitations for actions filed in the Court of Claims.

10 See note 5 *supra.*

ernment that is later dismissed without prejudice as improperly brought does not . . . toll the statute of limitations." Accordingly, he refused to transfer the district court action to the Court of Claims and dismissed the complaint. 275 F. Supp. 10 (S. D. N. Y. 1967). It is from this decision that Crown Coat appeals.

Thus, we have the following chain of events: Crown Coat, having established at great effort that a disputes clause claim was timely, returned to the district court and voluntarily relinquished all that it had won. It agreed that its claim was a breach claim even though all nine active judges of this court had apparently ruled *in banc* that any claim for breach of contract accrued no later than December 14, 1956, more than six years before the action in the district court was commenced. Nevertheless, its motion in the district court for an amendment of theory and increase of damages and transfer to the Court of Claims made no mention of the statute of limitations problem. Then, when the Government raised the point, Crown Coat first took the position that the district court should transfer the action to the Court of Claims without deciding the question. Finally, it met the issue head-on with two arguments not made before: (1) The filing of its 1962 action in the Court of Claims tolled the statute of limitations until the district court complaint was filed; and (2) its claim did not arise until March 1959, when it discovered the nature of the tests used by the Government, because until that date the Government "concealed" the facts.

The issues before us are whether Judge Mansfield erred in refusing to allow an increase in damages claimed and in dismissing the complaint. Decision of the first question rested in the judge's discretion. While it is true that Rule 15 of the Federal Rules of Civil Procedure provides that

ordinarily leave to amend "shall be freely given when justice so requires," these were most unusual circumstances. Crown Coat had offered as its claim three different figures at three different times. Originally, in 1962, it sought $25,270.01 in the Court of Claims; in 1963, in the district court, it asked for $9,500; finally, its proposed amended complaint sought $19,556.03. Although Crown Coat had first sued in the Court of Claims in 1962, it later aborted that suit itself by bringing another action in the Southern District. Moreover, when faced in 1963 with the imminent dismissal of its Court of Claims action because of the pendency of the district court suit, it chose to allow the latter to continue rather than to amend or add to its original Court of Claims complaint. Cf. *Nager Elec. Co.* v. *United States*, 368 F. 2d 847, 854-57 (1966). We agree with Judge Mansfield, 275 F. Supp. at 14-15:

> This is not a case of inadvertent error but one where suit was deliberately brought in this forum with full knowledge of its jurisdictional limitations instead of exercising its right to join two alternate theories ("breach" and "disputes clause") in one suit in the Court of Claims, where the plaintiff now seeks a transfer for a procedural or tactical advantage, after having invoked the facilities of the federal courts all the way to the Supreme Court, at no little time and expense to the Government. After such a tour de force the additional claim appears frivolous, and further shuttling back and forth between this Court and the Court of Claims is unjustified. Accordingly the motion to amend is denied. [Footnote omitted.]

Accordingly, we hold that the judge did not abuse his discretion in denying amendment of the complaint to allege greater damages.

We turn now to the judge's decision to dismiss the complaint. The argument that the Government concealed the test method employed, so that the statute of limitations was tolled, was properly rejected by the judge for the reasons set forth in his opinion, *id.* at 15-16, and requires no further discussion. The exhuming of the 1962 action in the Court of Claims as a separate ground for tolling the statute of limitations does raise a more substantial question.[11] But after careful analysis, we conclude that this argument should also be rejected.

Crown Coat conceded in the district court before Judge Mansfield, *id.* at 15, that a breach claim accrued on December 14, 1956, a concession consistent with the opinions of this court in its *in banc* consideration of the case. The basic issue is whether the events of this case justify tolling the time bar of 28 U. S. C. §2401(a).[12] Crown Coat litigated this question through the district court, this court (*in banc*), and the Supreme Court without once offering the 1962 Court of Claims action as a basis for tolling. In the prior decision of this court sitting *in banc*, the majority refused to construe section 2401(a) to allow tolling, even though faced with an appealing argument; i.e., that the Government, which requires administrative proceedings on disputes clause claims, can by drawing those proceedings out

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11 In essence, Crown Coat argues that it is within the intent of Congress to allow tolling when a properly filed and timely complaint in one federal court (Court of Claims) is later replaced by an equally proper but untimely action in another federal court (a district court). Compare *Burnett* v. *New York Central R.R.*, 380 U. S. 424 (1965). The Government argues that bringing suit in the Court of Claims against the Government does not toll the separate statute of limitations for suing the Government in the district court, particularly when the former action is dismissed because of plaintiff's own acts. The Government points out that were this not the case, the transfer provisions of 28 U. S. C. §§1406(a), (c) would be unnecessary.

12 See note 7 *supra*.

long enough "effectively defeat the rights of claimants to present their claims to a court of law," 363 F. 2d at 415. That justification for tolling was certainly more powerful than the one offered now, which is marred by Crown Coat's own inconsistent actions. It is true that this new tolling contention was not specifically made by Crown Coat to the *in banc* court so that traditional law of the case concepts would not technically apply. However, we regard the court's refusal to construe the statute of limitations as tolled by the appealing facts then offered as overpowering evidence of how it would have ruled on the argument Crown Coat now makes. It is significant that the prior *in banc* decision of this court was not overruled on the tolling issue; the Supreme Court did not discuss or decide it. Moreover, there does come a time when additional arguments to make the same ultimate point should be disregarded unless a good reason exists for the earlier omission. Cf. *Zdanok* v. *Glidden Co.*, 327 F. 2d 944, 953 (2d Cir.), cert. denied, 377 U. S. 934 (1964). Certainly, if after affirmance here, plaintiff were to advance still another argument for tolling, we think the district court or we could properly disregard it. We think that the situation now before us is much the same. In the district court the first time around, plaintiff could have urged the tolling effect of the 1962 action in the Court of Claims, whether plaintiff's claim was regarded as a breach or disputes clause type. In fact, before Chief Judge Ryan, plaintiff clearly envisioned both possibilities,[13] yet it chose to ignore the argument. Under all of the circum-

13 See Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment at 9-10, Supplemental Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment at 1-2, and Plaintiff's Reply Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment at 2, *Crown Coat Front Co.* v. *United States*, No. 63 Civ. 2281 (S. D. N. Y. Jan. 29, 1965).

stances, whatever might be the views of some of us were this or related statute of limitations issues[14] raised in a different case, we do not feel justified in considering further the tolling effect of plaintiff's 1962 action in the Court of Claims.

Accordingly, we affirm the decision below.

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14 E.g., in *Nager Elec. Co.* v. *United States*, 368 F. 2d 847 (Ct. Cl. 1966), the court stated that when a contractor has both disputes and breach claims under a single contract, suit on the latter can be delayed until administrative proceedings in the former are completed. We have not considered that point because Crown Coat clearly states it has only a breach claim.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

63 Civ. 2281

—

CROWN COAT FRONT CO., INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

—

MANSFIELD, D.J.

Plaintiff has moved to amend its complaint to state a claim for breach of contract in the amount of $19,556.03 and to transfer the case, over which this Court would no longer have jurisdiction, to the Court of Claims pursuant to 28 U. S. C.

§1406(c).[1] The parties have requested that this Court also determine whether the claim is barred by the statute of limitations.

This time-worn and weary case arises out of a May 14, 1956 contract between the plaintiff and the Government whereby the plaintiff was to manufacture 89,786 felt canteen covers and deliver them to the Government for a price of $60,691.76. Under the contract it was the Government's prerogative to test the covers for mildew resistance and to reject them if they did not meet specifications. The Government made such tests in October and November, 1956, found that the covers did not meet the specified standards with respect to mildew, but ultimately accepted the goods after agreeing to a reduction of $270.01 from the contract price.

Plaintiff claims that it did not discover until March 20, 1959 that the Government had tested the samples by a method different from that which had been contemplated under the contract. No action appears to have been taken thereafter by the plaintiff, however, for the next two and one-half years.

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[1] 28 U.S.C. §1406(c) provides in pertinent part:

"If a case within the exclusive jurisdiction of the Court of Claims is filed in a district court, the district court shall, if it be in the interest of justice, transfer such case to the Court of Claims, where the case shall proceed as if it had been filed in the Court of Claims on the date it was filed in the district court."

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On October 4, 1961, acting pursuant to the *"standard disputes"* clause[2] in the contract which provided that *"any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided"* by the Contracting Officer whose decision could

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[2] The clause provided:

> *"Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision by the Secretary or his duly authorized representative for the hearing of such appeals shall unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, be final and conclusive; provided that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be*

be appealed to the Armed Services Board of Contract Appeals ("*Board*" herein), plaintiff's counsel wrote the Contracting Officer demanding a refund of the $270.01 adjustment and an equitable adjustment with respect to plaintiff's increased production costs which resulted from the initial wrongful rejection of the samples. The claim was made under the "*Changes*" clause of the contract which provided that "*an equitable adjustment would be made in the contract price or delivery schedule*" if the Contracting Officer should make changes within the scope of the contract and that failure to agree on such an adjustment would give rise to a question of fact within the meaning of the "*disputes*" clause.[3] On February 21, 1962, the Contracting Officer filed his decision finding that the test methods employed by the Government had been entirely appropriate. The Board affirmed the contracting officer's denial of the claim on February 28, 1963.

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heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision."

[3] While the record does not indicate the specific provisions of the "*Changes*" clause, the standard clause provides:

"The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes

On July 31, 1963 plaintiff brought this suit to review the Board's decision under the Tucker Act (28 U.S.C. § 1346

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within the general scope of this contract, in any one or more of the following: (i) Drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery. If any such change causes an increase or decrease in the cost of, or the time required for the performance of any part of the work under this contract, whether changed or not changed by any such order, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. Any claim by the contractor for adjustment under this clause must be asserted within 30 days from the date of receipt by the Contractor of the notification of change, provided, however, that the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Where the cost of property made obsolete or excess as result of a change is included in the Contractor's claim for adjustment, the Contracting Officer shall have the right to prescribe the manner of disposition of such property. Failure to agree to any

(a)(2))[4] seeking a return of the $270.01 and damages not exceeding $10,000 which represented plaintiff's increased production costs resulting from the initial rejection of the goods. The complaint alleged that the Government's performance of the tests of the canteen covers for mildew constituted a *"change in contract specifications"* (Par. 10) entitling the plaintiff to an upward price adjustment under the contract's *"Changes"* clause; and that the Board's contrary decision of February 28, 1963 was not entitled to finality for the reason that it was *"capricious, arbitrary and not supported by substantial evidence, and concerned questions of law"*, entitling the plaintiff *"to an*

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adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled 'Disputes.' However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed." 32 C.F.R.§7.103-2.

[4] 28 U.S.C. §1346(a)(2) provides that the district courts shall have original jurisdiction, concurrent with the Court of Claims of:

> *"Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United*

equitable adjustment of the contract price". On February 2, 1965 the district court dismissed plaintiff's claim as barred by the six-year statute of limitations applicable to actions against the United States.[5] The Court of Appeals affirmed en banc, 363 F.2d 407, and the Supreme Court reversed on the ground that if the claim was one *"arising under the contract"* the right of action did not accrue until the Board finally ruled on the claim. 386 U.S. 503. In view of the fact that the Government denied that the claim was one *"arising under"* the contract and contended that it was a *"pure breach of contract claim which accrued not later than the date of the contract"*, the Supreme Court remanded the case to the district court for determination of that issue with the advice that *"If the claim is not within the disputes clause, the court may then determine whether it is time-barred."*

States, or for liquidated damages or unliquidated damages in cases not sounding in tort."

[5] 28 U.S.C. §2401 provides:

"(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases."

During the pendency of the foregoing proceedings the plaintiff on December 12, 1962, commenced a suit in the Court of Claims for breach of the contract, praying for $25,000 damages. On September 29, 1963, the Court of Claims action was dismissed without prejudice due to the pendency of the present case.

After having obtained a favorable decision from the Supreme Court on the basis of its contention that its claim in the present suit was one *"arising under"* the contract, plaintiff now for the first time states that it *"accepts the Government's viewpoint that the claim asserted by plaintiff herein is a pure breach of contract"* (P. 1, *"Memorandum of Points and Authorities"* submitted August 1, 1967)[6] and asks leave to amend the complaint to assert a simple breach of contract claim for damages in the sum of $19,556.03, instead of its claim based on the alleged arbitrary action of the Board in denying its claim for equitable adjustment under the *"Changes"* and *"Disputes"* clauses of the contract.

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[6] See also *"Plaintiff's Reply Memorandum of Law re Statute of Limitations"* which bears as POINT I heading *"Plaintiff's claim is for a breach of contract"* and states (p. 7) *"The parties have agreed that plaintiff's claim is for breach"* and (p. 8) *"The parties now agree that the issue before the Court arose from breach of contract and not as a claim 'arising under' the Changes article of the contract."*

Insofar as plaintiff seeks to amend the complaint to increase the ad damnum to $19,556.03 and to have the case transferred to the Court of Claims on the ground that this Court would thereby oust itself of jurisdiction, 28 U.S.C. §1346(a)(2) and *Luria Bros. & Co. v. United States*, 369 F.2d 701 (Ct. Cl. 1966), such relief does not appear to be in the interest of justice. See Rule 15(a), F.R.C.P. and 28 U.S.C. §1406(c). There is no showing that the increased damages were not known when the action was begun in July 1963 or that they could not have been asserted either under the *"Changes"* clause of the contract, in which event the case might have been transferred to the Court of Claims long before the extensive proceedings herein, or joined with the *"disputes"* claim as alternative claims in an action in the Court of Claims. This is not a case of inadvertent error but one where suit was deliberately brought in this form with full knowledge of its jurisdictional limitations instead of exercising its right to join two alternate theories (*"breach"* and *"disputes clause"*) in one suit in the Court of Claims, where the plaintiff now seeks a transfer for a procedural or tactical advantage,[7] after having invoked the facilities of the federal

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[7] The tactical advantage would apparently lie in the fact (noted below) that the Second Circuit in this case has held that any *"breach"* claim accrued on December 14, 1956, 363 F.2d 407, 410, whereas

courts all the way to the Supreme Court, at no little time and expense to the Government. After such a tour de force the additional claim appears frivolous, and further shuttling back and forth between this Court and the Court of Claims is unjustified. Accordingly the motion to amend is denied.

Since both sides agree that the claim is one for breach of contract and have asked this Court to rule on the question of whether it is time-barred, as suggested by the Supreme Court, this Court has considered the question and concludes that the claim is barred by the six-year statute of limitations. 28 U.S.C. §2401, *supra*, note 5.

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the Court of Claims has indicated in another case, *Nager Electric Co. v. United States*, 368 F.2d 847, 857, that where a *"disputes"* clause claim and *"breach"* claim arise out of a single contract, the time-bar does not start running as to either until the termination of the administrative process. The present case, however, is not one where the plaintiff has joined two claims arising out of the same facts, i.e., one under the *"disputes"* clause and the other for *"breach"*, contending that the time bar was tolled as to the breach claim pending exhaustion of the administrative process with respect to the *"disputes"* clause claim. Plaintiff here concedes that its sole claim is one for *"pure breach of contract"* and offers other arguments (noted below) in support of its contention that the claim is not time-barred.

Upon oral argument both sides took the position that plaintiff's cause of action for breach of contract accrued on December 14, 1956, which was more than six years prior to plaintiff's institution of the present lawsuit on July 31, 1963.[8] Plaintiff asserts, however, that the six-year statute of limitations was tolled on December 12, 1962, when it filed its suit for $25,000 damages in the Court of Claims, which was still pending when the plaintiff filed its suit here. Plaintiff relies heavily on *Burnett v. New York Cent. R.R.*, 380 U.S. 424 (1965), which held that the statute of limitations was tolled for the duration of a state court FELA suit in Ohio that was dismissed for improper venue. It also refers us to such other cases rejecting the defense of the statute of limitations as *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965); *Berry v. Pacific Sportfishing, Inc.*, 372 F.2d 213 (9th Cir. 1967); *United States v. Woodbury*, 359 F.2d 370 (9th Cir. 1966); *Izquierdo v. Cities Serv. Oil Co.*, 244 F. Supp. 758 (S.D.N.Y. 1965). Aside from the distinguishing factor of the Supreme Court's emphasis on the humanitarian purpose of the

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[8] This was the conclusion of the Court of Appeals, which stated in its en banc decision, 363 F.2d 407 at 410, "*At the outset we agree with the finding of the court below that the alleged breach of the contract occurred at the very latest on December 14, 1956,*" and is binding on this Court. (Emphasis supplied)

FELA, plaintiff's reliance on *Burnett* is misplaced because the present suit is against the United States, not a private person. See *Kendall v. United States*, 107 U.S. 123 (1882). Since the United States possesses sovereign immunity, it may be sued only under such conditions as Congress specifically permits. Indeed, the terms of the Congressional consent delimit the Court's jurisdiction to entertain the suit. *United States v. Sherwood*, 312 U.S. 584 (1941). Limitations and conditions upon this consent must be strictly observed and exceptions are not to be implied. *Soriano v. United States*, 352 U.S. 270 (1957). For example, generally the running of a statute of limitations provides a defense but does not extinguish the claim, which may be revived with the defendant's consent. In marked contrast the rule regarding limitations of action against the United States is that the statute is jurisdictional and that the running of the prescribed time period extinguishes the claim, which cannot thereafter be revived or waived. See *Finn v. United States*, 123 U.S. 227 (1887). Commencement of an action against the Government that is later dismissed without prejudice as improperly brought does not, therefore, toll the statute of limitations. The language of such cases as *Goldlawhr, Inc. v. Heiman*, 369 U.S. 463, 466 (1962), reveals a clear assumption that such is the law. See, e.g., *Callan v. Lillybelle, Ltd.*, 39 F.R.D. 600 (S.D.N.Y. 1966); and Sen. Rep. 1894, 86th Cong., 2d Sess., 1960 U.S. Code, Cong. & Ad. News 3583.

After the plaintiff, upon argument of the motion, was faced with the foregoing

answer to its *"tolling"* claim, its counsel, with the Court's permission, filed an additional memorandum contending that the Government concealed from it the test method it used and that the cause of action did not accrue until March 20, 1959, when the Government informed the plaintiff of the details of the test, which would render it timely within the meaning of 28 U.S.C. §2401. Plaintiff has nowhere alleged, however, that any fraudulent intent was involved on the part of the Government and, indeed, it would seem that there was none. There is no suggestion that the Government, prior to the time the statute of limitations would normally have run, was unwilling to inform plaintiff of the type of test that had been used. Thus, plaintiff has not set forth the essential facts required to be alleged in cases of this sort. There is a sharp distinction between *"fraudulent concealment"* and failure to ascertain the existence of a cause of action through exercise of due diligence. When Congress wishes the latter to postpone the running of a statute of limitations, it says so (*Atlantic City Elec. Co. v. General Elec. Co.*, 312 F.2d 236 (2d Cir.), *cert. denied*, 373 U.S. 909 (1963)). The general rule is that lack of knowledge of the existence of a cause of action, or of facts giving rise thereto, will not suspend its accrual for the purposes of the statute of limitations. *Thomas v. United States*, 125 Ct. Cl. 76 (1953); see *Navajo Freight Lines v. United States*, 176 Ct. Cl. 1265 (1966). But even if we indulge in some flexibility and apply a standard of reasonableness in determining the date when a plaintiff should, with the exercise of due diligence, have discovered the

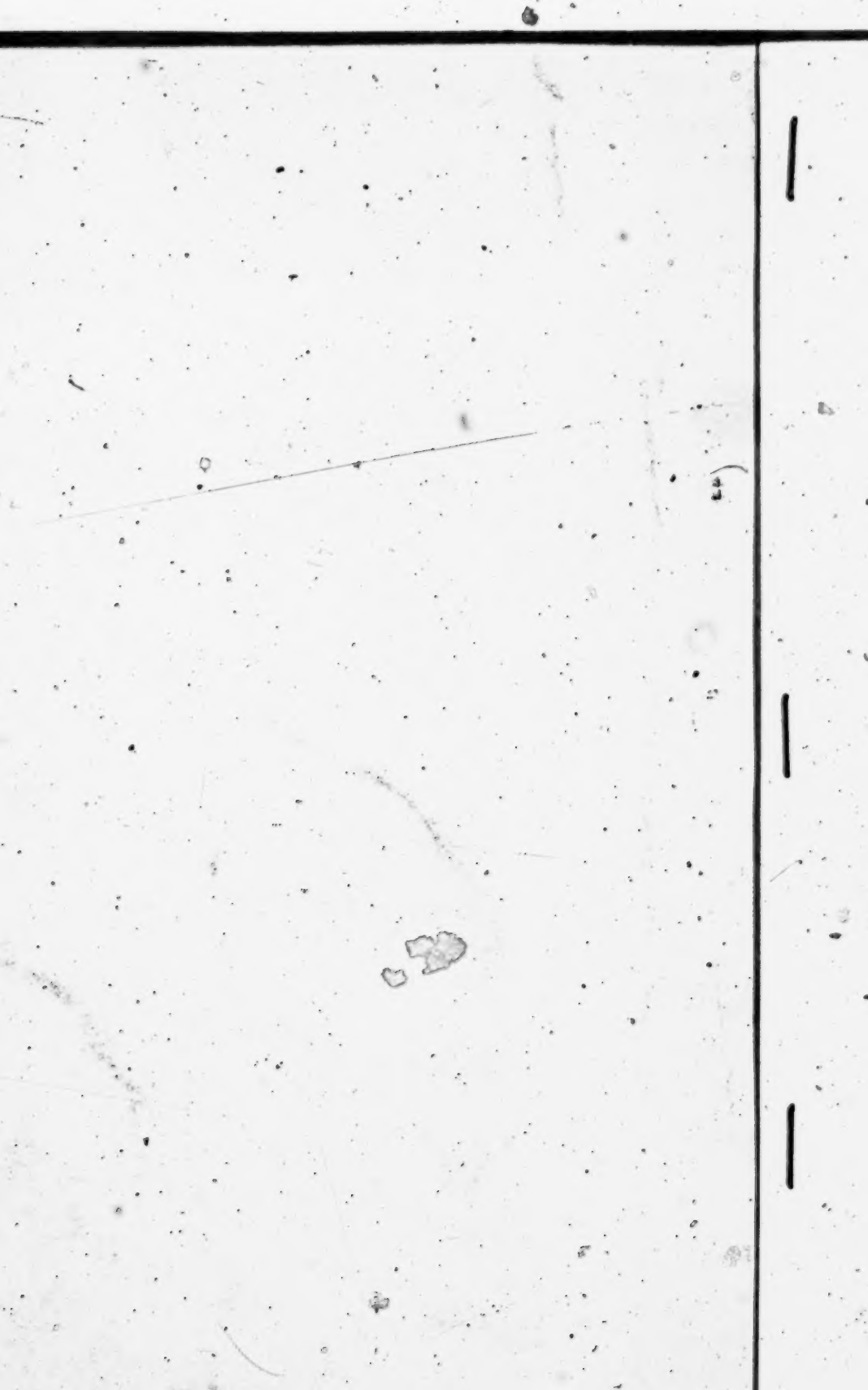
existence of the cause of action, see *Kossick v. United States*, 330 F.2d 933 (2d Cir. 1964), no basis exists for postponing the accrual beyond that date. *Japanese War Notes Claim Assn. v. United States*, 373 F.2d 356 (Ct. Cl. 1967). Here plaintiff has never contended that reasonable diligence would not have revealed the test method long prior to July 31, 1957, which was six years before commencement of the action. Indeed, due diligence would have led the plaintiff to inquire into the test method in 1956, when the Government rejected the samples on the ground that they did not contain the contract quantities of mildew inhibitors. Plaintiff offers no reason for not having done so at that time.

Accordingly, the motion to amend the complaint is denied and the complaint is dismissed as time-barred.

SO ORDERED.

/s/ Walter R. Mansfield
U.S.D.J.

Dated: September 20, 1967.



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SUPREME COURT, U. S.

No. 290

FILED
JUL 31 1968
JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

CROWN COAT FRONT CO., INC.,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Pursuant to Rule 24.5 petitioner files this supplemental brief calling attention to a decision of the United States Court of Claims rendered July 17, 1968 following the filing of this petition for certiorari on July 15, 1968.

QUESTION PRESENTED

Whether equitable adjustment of the contract price under the standard Changes article of a Government supply contract is limited to direct costs, whereas a judicial action for breach of contract recovers all increased costs and expenses resulting from Government fault.

REASON FOR ALLOWANCE OF WRIT

The Court of Appeals cited as a reason for denying petitioner's motion for leave to amend, that it *"had offered as its claim three different figures at three different times. Originally in 1962, it sought $25,270.01 in the Court of Claims; in 1963, in the district court, it asked for $9,500; finally, its proposed amended complaint sought $19,556.03"* (App., *infra*, p. 19). The Court of Appeals rejected petitioner's explanation that its 1962 suit was for reformation of the supplemental agreement under which $270.01 was paid, and $25,000 damages for unreasonable delay; that its 1963 District Court action seeking $9,500.00 was for direct costs, increased overhead expenses, due under equitable adjustment of the contract price pursuant to the Changes article; and that its proposed amendment seeking $19,556.03 was for all its increased costs and expenses, $9,500.00 increased overhead expenses, and loss of productivity of labor, $.112 per unit, for 89,786 units, $10,056.03, totalling $19,556.03. See Petition for Rehearing at pp. 3-4, Record pp. 433-4.

The United States Court of Claims on July 17, 1968 decided *Red Circle Corporation v. The United States*, No. 430-66 and there said, Slip op. 9:

> "We have held, and now affirm, that jurisdiction is vested in the Board under either the standard Changes or Changed Conditions Articles, depending upon the circumstances, to equitably adjust the contract price for the direct costs, if any, flowing from defective plans and specifications. Delay damages resulting from government fault in such cases is treated separately as a breach of contract, initially redressable in court, unless there is that type of Suspension of Work Clause inserted in the contract which converts the cause of action to one 'arising under' the contract. See generally, *Phillips Constr. Co. v. United States*, Ct.Cl. No. 334-63, decided May 10, 1968; *Clack v. United States*, Ct.Cl. No. 155-63, decided May 10, 1968; *Jefferson Constr. Co. v. United States*, Ct.Cl. No. 81-65, decided April 19, 1968; and *Maxwell Dynamometer Co. v. United States*, 181 Ct.Cl. 607, 386 F.2d 855 (1967)."

There is a clear conflict present. The Court of Appeals brushed aside and ignored the rule of damages cited by petitioner and the United States Court of Claims has now clearly established such rule of damages.

This issue is constantly recurring and the conflict should be settled by this Court.

Respectfully submitted,

EDWIN J. McDERMOTT
Attorney for Petitioner

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AUG 15 1968
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No. 290

In the Supreme Court of the United States

OCTOBER TERM, 1968

CROWN COAT FRONT CO., INC., PETITIONER

v.

UNITED STATES OF AMERICA

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 290

CROWN COAT FRONT CO., INC., PETITIONER

v.

UNITED STATES OF AMERICA

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On May 14, 1956, petitioner entered into a contract with the Department of the Army to manufacture and deliver 89,786 canteen covers of mildew-resistent felt, at a total price of $60,091.76. Pursuant to the terms of the contract, petitioner submitted sample canteen covers for inspection and testing. The samples were rejected on the ground that they were not sufficiently mildew resistent. At petitioner's request, the contract was modified to permit it to supply the non-conforming covers at a total price reduction of $270.01, and the covers were delivered on December 14, 1956.

On October 4, 1961, petitioner filed a claim with the contracting officer, contending that the government had used an improper method in testing the samples, and demanding a refund of the $270.01 price adjust-

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ment plus an equitable adjustment for increased costs occasioned by delay resulting from the rejection of the samples.[1] On February 21, 1962, the contracting officer found that the method of testing was proper and denied petitioner's claim. The Armed Services Board of Contract Appeals affirmed the contracting officer's decision on February 28, 1963. On December 12, 1962, two months before the Board rendered its decision and two days before the statute of limitations would have run, petitioner filed a complaint in the Court of Claims under 28 U.S.C. 1491, seeking damages of $25,270.01 for breach of the contract.

On July 31, 1963—five months after the Board's decision, but six years and seven months after petitioner had completed performance—petitioner commenced the present action in the district court under the Tucker Act (28 U.S.C. 1346(a)(2)) to review the Board's decision; petitioner sought a refund of the $270.01 price adjustment and a sum "not exceeding $10,000" as compensation for extra production costs. Because of the pendency of two suits arising out of the same transaction, the Court of Claims dismissed the suit before it without prejudice. See 28 U.S.C. 1500. The district court thereafter granted the government's motion for summary judgment on the ground that the complaint was barred by the six-year statute of limitations (28 U.S.C. 2401(a)). The court of ap-

[1] This demand was made under the standard "disputes clause" in the contract, which provided that "any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer" and that an appeal from his decision could be taken to the Secretary of the Army or his authorized representative.

peals affirmed. 363 F. 2d 407. This Court reversed, holding that if petitioner's claim arose under the disputes clause of the contract, the cause of action did not accrue until the final decision of the Armed Services Board of Contract Appeals was rendered. 386 U.S. 503. The Court specifically stated that if, however, petitioner's claim was not within the disputes clause, and was merely founded on an alleged breach of contract, it was for the district court to determine whether that claim was time barred. 386 U.S. at 522.

On remand in the district court, petitioner abandoned its claim under the disputes clause and sought to amend its complaint to assert a claim for simple breach of contract and to increase the damages sought to $19,556.03. The district court held that it would not be in the interest of justice to allow the amendment to the damages, on the ground that, since there was no showing that the amount of damages was unknown in 1963, the amendment was an attempt to oust the district court of jurisdiction and transfer the cause to the Court of Claims for a procedural advantage (Pet. App. 31; see Rule 15(a), F. R. Civ. P.; 28 U.S.C. 1406(c)).

The court then granted the government's motion to dismiss the complaint because the action for breach of contract was barred by the six-year statute of limitations. Both parties agreed that the cause accrued on December 14, 1956, but petitioner argued that the statute of limitations was tolled on December 12, 1962, when it filed a timely suit in the Court of Claims. The court rejected that argument, holding that the statute of limitations is jurisdictional and is

not tolled by the commencement of an action against the government which is later dismissed (Pet. App. 33–34). The court also rejected petitioner's additional contention that the statute was tolled because the nature of the test had been concealed by the government. The court found that there was no allegation of any wrongful withholding of that information, and that petitioner merely failed to ascertain the existence of its alleged cause of action, which did not affect the running of the statute of limitations (Pet. App. 35–36). The court of appeals affirmed (Pet. App. 11–22).

1. The decisions of both courts below are correct. Petitioner's amended cause of action for simple breach of contract concededly accrued on December 14, 1956, the date of final delivery under the contract. Petitioner's complaint for breach of that contract (as amended) was not filed until July 31, 1963—~~six~~ seven and one half months after the statute of limitations had run (28 U.S.C. 2401).

This Court has consistently held that limitations on the United States' consent to be sued are to be strictly construed. *E.g., United States* v. *Sherwood,* 312 U.S. 584. This is particularly true with regard to time limitations, for otherwise the result would be to "impose the tolling of the statute in every time-limit-consent Act passed by the Congress. * * * Congress was entitled to assume that the limitation period it prescribed meant just that period and no more." *Soriano* v. *United States,* 352 U.S. 270, 275–276.

In enacting 28 U.S.C. 1406 and 1506, to provide that suits brought in the wrong forum might be transferred

rather than dismissed, Congress apparently recognized that a complaint might be timely, but improperly, filed in the Court of Claims and yet not toll the running of the statute of limitations, with the result that a later attempt to file the same claim in a district court might be barred. The transfer provisions were designed to save the cause of action from the statutory bar where a timely complaint is filed in an incorrect forum and subsequently transferred, after the statute has run, to the correct forum. Nothing in those provisions, however, acts to save the cause of action if the complaint is dismissed rather than transferred. As the Senate Report stated, "filing suit in the wrong court cannot operate either to shorten or enlarge the applicable statute of limitations." S. Rep. No. 1894, 86th Cong., 2d Sess., p. 2.

Unlike *Nager Electric Co.* v. *United States*, 368 F. 2d 847 (Ct. Cl.), on which petitioner relies, petitioner has not attempted to join alternative claims based on the disputes clause and on breach of contract. The sole claim is for breach of contract, and petitioner's only ground for avoiding the statutory bar is that the statute was tolled by the filing of the suit in the Court of Claims. Petitioner's maneuverings in this case, however, demonstrate the flaw in the rule for which it argues. At the time petitioner filed its complaint in the district court, all administrative proceedings had been completed, and petitioner could fairly be required to determine whether its claim for relief was within the disputes clause or was founded on breach of contract. Rather than amending its protec-

tive action in the Court of Claims, petitioner elected to file a suit for review of the Board's decision in the district court and abandon its Court of Claims action. Having established its right to maintain that suit, after great expense to the government and the courts, petitioner decided that its claim is not within the disputes clause, calling for review of the Board's decision, but instead is based on a breach of contract which occurred in 1956. And petitioner also sought to increase its claim for damages in order to require that the case be transferred back to the Court of Claims. Having twice elected to forego its breach of contract claim, petitioner should not be permitted to present that claim when and where it chooses solely by reason of its abandoned suit in the Court of Claims.

2. The running of the statute of limitations was not tolled by the government's failure to volunteer information regarding the type of test performed on the felt canteen covers. As noted by the district court, petitioner failed to allege any intentional concealment regarding these tests.[4] Petitioner's delayed knowledge apparently resulted from its failure to exercise due diligence in inquiring into the type of test used. That is not sufficient to prevent the running of the statute of limitations. See, *e.g.*, *Spevack* v. *United States*, 390 F. 2d 977 (Ct. Cl.); *Japanese War Notes Claimants Ass'n.* v. *United States*, 373 F. 2d 356 (Ct. Cl.), certiorari denied, 389 U.S. 971.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

CROWN COAT FRONT CO., INC.,
Petitioner,

V.

UNITED STATES OF AMERICA

PETITIONER'S REPLY BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 290

CROWN COAT FRONT CO., INC.,
Petitioner,

v.

UNITED STATES OF AMERICA

PETITIONER'S REPLY BRIEF

QUESTIONS INVOLVED

1. Should not the Memorandum for the United States in Opposition, which misrepresents the issues and seeks to mislead the Court, be disregarded by the Court?

2. Is not the question, whether the tolling principle established in *Burnett v. New York Central R. Co.*, 1965, 380 U.S. 424, a Federal Employer's Liability Act action, applies to a Tucker Act discourt action, an important substantial issue to be determined by the Court?

ARGUMENT

1. Since the Memorandum for the United States in Opposition misrepresents the issues and seeks to mislead the Court, it should be disregarded by the Court.

The Memorandum in Opposition (p. 1) erroneously asserts *"The samples were rejected on the ground that they were not sufficiently mildew resistent*[sic]." The samples were mildew resistant but it was found on the colorimetric test method that they *"did not contain the contract quantities of mildew inhibitors."* Pet. App. p. 13. The contract mildew resistant specifications were both qualitative and quantitative.

The Memorandum in Opposition (p. 1) omits the discovery by petitioner in March 1959, of respondent's use of the colorimetric test method, Pet. App. p. 13; and further omits *Appeal of Crown Coat Front Co., Inc.*, 61-2 BCA § 3157, ASBCA 1961, which reports the proceedings to September 19, 1961. The Memorandum in Opposition (p. 2) further omits the change on June 3, 1963 in legal climate due to *United States v. Carlo Bianchi*, 1963, 370 U.S. 709. The Memorandum in Opposition (p. 3) cites the District Court opinion below (Pet. App. p. 31) for its statement that petitioner sought transfer to the Court of

Claims *"for a procedural advantage"* but neglects to inform the Court that the District Court made that statement in a footnote (Pet. App. pp. 31, 32) and then found in the same footnote that there was no such tactical advantage (Pet. App. p. 32). The Memorandum in Opposition (p. 3) asserts that the District Court below held that the statute of limitations is jurisdictional citing Pet. App. pp. 33, 34, whereas the District Court said (Pet. App. p. 34): *"plaintiff's reliance on Burnett is misplaced because the present suit is against the United States, not a private person."*

The Memorandum in Opposition does not cite *Burnett v. New York Central R. Co.*, 1965, 380 U.S. 424, upon which petitioner relies as the first of its reasons for allowance of writ (Pet. p. 9) but informs the Court that petitioner relies on *Nager Electric Co. v. United States*, 1966, 177 Ct. Cl. 234, 368 F.2d 847. Yet, as the petition, p. 9, shows, petitioner cites *Nager* as the second reason for allowance of writ, *Nager* being in conflict with the Court of Appeals determination that the United States is sovereignly immune from tolling. Respondent seeks to mislead the Court.

Here, respondent has said nothing about the application of *Burnett v. New York Central R. Co., supra,* to this case although that was the issue with which the

courts below were concerned[1] and which was the first reason advanced by petitioner for allowance of the writ (Pet. p. 9).[2] Instead respondent represents to the Court that petitioner relies upon *Nager Electric Co. v. United States, supra.* Respondent seeks to mislead the Court.

For such conduct, it is respectfully suggested that the Court should disregard the Memorandum for the United States in Opposition.

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[1] *Crown Coat Front Co. v. United States,* 2 Cir. 1968, 395 F.2d 160, 165 (Pet. App. pp. 20, 21); *Crown Coat Front Co. v. United States,* S.D.N.Y. 1967, 275 F. Supp. 10, 15 (Pet. App. pp. 33, 34).

[2] Respondent itself urged *Burnett v. New York Central R. Co., supra,* upon the Court of Appeals for the 9th Circuit in its action under the False Claims Act: *United States v. Woodbury,* 9 Cir. 1966, 359 F.2d 370.

2. Whether the principle of tolling established in *Burnett v. New York Central R. Co.*, an FELA action, applies to a Tucker Act district court action, is an important substantial question to be determined by the Court.

Burnett v. New York Central R. Co., supra, has been cited by the Court in *Minnesota Mining v. N. J. Wood Co.*, 1965, 381 U.S. 311, 321 (an anti-trust action); *Auto Workers v. Hoosier Corp.*, 1966, 383 U.S. 696, 703 (a Labor Management Relations Act suit); *Honda v. Clark*, 1967, 386 U.S. 484, 501 (a suit under the Trading with the Enemy Act).

Burnett v. New York Central R. Co., supra, has been cited by the Courts of Appeals in *Schwartz v. S.S.Nassau*, 2 Cir. 1965, 345 F.2d 465, 468 (an action for wrongful death against a steamship and her owner); *Moore Co. of Sikeston, Mo. v. Sid Richardson Carbon & Gas Co.*, 8 Cir. 1965, 347 F.2d 921, 927 (an anti-trust action); *Northern Metal Co. v. United States*, 3 Cir. 1965, 350 F.2d 833, 837 (a Tucker Act district court action); *Kondo v. Katzenbach*, D.C.Cir. 1966, 356 F.2d 351, 364 *(sub. nom. Honda v. Clark, supra)*; *United States v. Woodbury*, 9 Cir. 1966, 359 F.2d 370 (an action by the United States under the False Claims Act); *Berry v. Pacific Sportfishing Inc.*, 9 Cir. 1967, 372 F.2d 213, 214 (an action concerning

the Death on the High Seas Act); *Belton v. Traynor*, 4 Cir. 1967, 381 F.2d 82, 86 (an action under the Longshoremen's and Harbor Workers' Compensation Act); *H.L. Peterson Company v. Applewhite*, 5 Cir. 1967, 383 F.2d 430, 434 (a counterclaim for fraudulent misrepresentation); *Shircliff v. Elliott*, 6 Cir. 1967, 384 F.2d 947, 949 (an action for personal injury and property damage resulting from a two-car collision that occurred on the Fort Knox United States Military Reservation); *State of New Jersey v. Morton Salt Company*, 3 Cir. 1967, 387 F.2d 94, 97 (an anti-trust action); *Crown Coat Front Co. v. United States*, 2 Cir. 1968, 395 F.2d 160, 165 (the present case, a Tucker Act district court suit).

Burnett v. New York Central R. Co., *supra*, has been cited by the District Courts in *Safir v. Compagnie Generale Transatlantique*, E.D.N.Y. 1965, 241 F. Supp. 501, 505 (action for ante-mortem damage and for wrongful death based on accident on high seas); *Izquierdo v. Cities Service Oil Co. (Pa.)*, S.D.N.Y. 1965, 244 F.Supp. 758, 760 (Jones Act suit for injuries, maintenance and cure); *Bealle v. Nyden's, Incorporated*, D.Conn. 1965, 245 F.Supp. 87, 90 (diversity action arising out of automobile accident); *Higgins, Inc. v. Kiekhaefer Corporation*, E.D.Wisc. 1965, 246 F.Supp. 610, 611 (patent infringement); *A. O. Smith Corporation v. Applewhite*, S.D.Tex. 1965, 255 F.Supp. 785, 795 (diversity action on note covering feed storage apparatus); *United States v. Vibradamp Corporation*, S.D.Cal. 1966, 257 F.Supp. 931, 940 (action

by United States to recover sum due on Government contract after redetermination proceeding); *Atkins v. Schmutz Manufacturing Company*, W.D.Va. 1967, 268 F.Supp. 406, 407 (diversity action for personal injuries); *Mumpower v. Southern Railway Company*, W.D.Va. 1967, 270 F.Supp. 318, 319 (Federal Employers Liability Act suit); *Chambliss v. Coca-Cola Bottling Corporation*, E.D.Tenn. 1967, 274 F.Supp. 401, 410 (a stockholder's suit under the Securities Act of 1933); *Crown Coat Front Co. v. United States*, S.D.N.Y. 1967, 275 F. Supp. 10, 15 (the present case, a Tucker Act district court action); *Ptaszynki v. Ferrell*, E.D.Tenn. 1967, 277 F.Supp. 969, 970 (diversity action for personal injuries).

In the District Court below, *Crown Coat Front Co. v. United States*, S.D.N.Y. 1967, 275 F.Supp. 10 (Pet. App. p. 23), the court discussed the application of the tolling principle of *Burnett v. New York Central R. Co.*, *supra*, to the present Tucker Act district court action and said, 275 F.Supp. at 15 (Pet. App. p. 33): *". . . plaintiff's reliance on Burnett is misplaced because the present suit is against the United States, not a private person."* [3] In the Court of Appeals, below *Crown Coat Front Co. v. United States*,

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[3]. Contrary to *Honda v. Clark*, 1967, 386 U.S. 484, 501.

2 Cir. 1968, 395 F.2d 160, the Court relegated *Burnett v. New York Central R. Co., supra,* to a footnote, 395 F.2d at 165 (Pet. App. p. 20), and reasoned that the Tucker Act limitation was not subject to tolling[4] and that petitioner should have urged the tolling principle of *Burnett v. New York Central R. Co., supra,* decided April 5, 1965, when before the District Court *"the first time around"* (395 F.2d at 165, Pet. App. p. 21) whose decision was filed January 29, 1965 (Pet. p. 6).

In the Memorandum for the United States in Opposition, filed herein August 15, 1968, *Burnett v. New York Central R. Co., supra,* is not mentioned at all.

This might be viewed as an illustration of the law of diminishing returns. In the District Court's opinion, *Burnett v. New York Central R. Co., supra,* is in the body of the opinion; in the Court of Appeals' opinion, it is relegated to a footnote; in the Memorandum for the United States in Opposition, it is not at all.

It is suggested that *Burnett v. New York Central R. Co., supra,* should be restored to its rightful place in the judicial hegemony. The grant of certiorari herein would do this.

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4. Contrary to *Northern Metal Co. v. United States,* 3 Cir. 1965, 350 F.2d 833.

This is particularly appropriate, since the United States urged the *Burnett v. New York Central R. Co.*, *supra*, rule of tolling in *United States v. Woodbury*, 9 Cir. 1966, 359 F.2d 370, an action by the United States under the False Claims Act (31 U.S.C. §§ 231-33).

The Memorandum for the United States in Opposition contends (Memorandum p. 4) on the authority of *United States v. Sherwood*, 1941, 312 U.S. 584 and *Soriano v. United States*, 1957, 352 U.S. 270, that the limitation provision of the Tucker Act may not be extended by tolling. But this is contrary to *Northern Metal Co. v. United States*, 3 Cir. 1965, 350 F.2d 833, and on this issue alone certiorari should be granted. There is an unresolved conflict as to this issue. See *Crown Coat Front Co. v. United States*, 1967, 386 U.S. 503 at 508-9; *Crown Coat Front Co. v. United States*, 2 Cir. 1968, 395 F.2d 160 at 165 (Pet. App. p. 21).

The Memorandum for the United States in Opposition contends (Memorandum pp. 4, 5) that the transfer provisions of 28 U.S.C. §§ 1406 and 1506, and S.Rep. No. 1894, 86th Cong. 2d Sess., p. 2, do not save the cause of action if it is dismissed rather than transferred, and that *"filing suit in the wrong court cannot operate either to shorten or enlarge the applicable statute of limitations."* This has no application here. We are not concerned with shortening or enlarging the statute of limitations but with tolling it. The transfer provisions of 28 U.S.C. §§ 1406(c) and 1506 are respectively:

"the case shall proceed as if it had been filed in the Court of Claims on the date it was filed in the district court" and *"where the case shall proceed as if it had been filed in the district court on the date it was filed in the Court of Claims."* Such language makes it clear that filing in the wrong court does not shorten and does not enlarge the applicable statute of limitations, but the limitation period stops when suit is filed in the wrong court. The Memorandum for the United States in Opposition simply advances this contention in an effort to mislead the Court. It has no relevance to this case.

The Memorandum for the United States in Opposition further asserts (Memorandum p. 5) that petitioner relies as its sole reason for allowance of writ of certiorari upon *Nager Elec. Co. v. United States*, 1966, 177 Ct. Cl. 234, 368 F.2d 847, but that *Nager* does not apply since petitioner has not attempted to join alternative claims based on the disputes clause and on breach of contract. Respondent's own explanation convicts it of an attempt to mislead the Court. Petitioner does rely on *Nager* solely for the principle that the United States is not sovereignly immune from tolling (Pet. p. 9). In the same sentence (Pet. p. 9) in addition to *Nager* petitioner cites *Honda v. Clark*, 1967, 386 U.S. 484; *United States v. Yellow Cab Co.*, 1951, 340 U.S. 547; and *Northern Metal Co. v. United States*, 3 Cir. 1965, 350 F.2d 833. Respondent in its Memorandum seeking to mislead the Court, says: *"Unlike Nager Electric Co.*

v. United States, 368 F. 2d 847 (Ct.Cl.) on which petitioner relies..." This is clearly improper and respondent's counsel should not be permitted to thus conduct themselves before the Court.

Respondent urges (Memorandum pp. 5, 6) that petitioner should be censured for failing to determine initially whether its claim for relief was within the disputes clause or was founded on breach of contract. But here the contracting officer and the Board of Appeals considered petitioner's claim to be within the disputes clause: *Appeal of Crown Coat Front Co.*, 63-1 BCA § 3681, ASBCA 1963, as did the Court of Appeals: *Crown Coat Front Co. Inc. v. United States*, 2 Cir. 1966, 382 F.2d 407. The inquiry came up during oral argument before the Court and was expressed in the Court's opinion: *Crown Coat Front Co. v. United States*, 1967, 386 U.S. 503, 522: *"The Government in its answer to the complaint, however, denied that the claim arose under the contract, characterized it instead as a pure breach of contract claim which accrued no later than the date of the completion of the contract. The District Court did not decide this issue; nor do we. This matter will be open on remand to the District Court. If the claim is not within the disputes clause, the court may then determine whether it was time barred."* This change in legal climate occurred in *United States v. Utah Constr. & Mining Co.*, 1966, 384 U.S. 394, followed by Judge Davis' exhaustive review and analysis of the difference between

disputes clause claims and breach of contract claims in *The Len Company v. United States*, 1967, 181 Ct. Cl. , 385 F.2d 438. Petitioner has always presented its claim in the prevailing legal climate. That there has been a change in the legal climate is a normal incident of the judicial process. See *Union Bag-Camp Paper Corp. v. United States*, 1966, 177 Ct. Cl. 212, 366 F.2d 1011.

The Memorandum for the United States in Opposition (Memorandum p. 2) contends that "*apparently*" petitioner's failure to exercise due diligence in inquiring into the type of test used was the cause of petitioner's failure to penetrate the concealment by defendant of its use of a colorimetric method to test the mildew inhibitor content of petitioner's dyed felt. But this is pure conjecture on respondent's part as its use of the qualifying "*apparently*" indicates. Conjecture is not fact, as respondent's own statement admits.

Clearly the principle of *Burnett v. New York Central R. Co.*, *supra*, is the focal point in this petition. The issue is whether under the Tucker Act a timely Court of Claims action, instituted December 12, 1962, tolled the running of the statute of limitations so that the District Court action, instituted July 31, 1963 was timely, even though the Court of Claims action was dismissed without prejudice on respondent's motion on August 19, 1963. Respondent has always been on notice of petitioner's claim: See *Telegraphers v. Ry. Express Agency*, 1943, 321 U.S. 342, 348-349.

Clearly the issue of the application of the rule of *Burnett v. New York Central R. Co., supra,* so frequently before the courts, should be resolved by the granting of the writ of certiorari prayed for herein.

CONCLUSION

The Memorandum for the United States in Opposition is replete with error and misrepresentation, there being some six instances where it has sought to mislead the Court.

Burnett v. New York Central R. Co., supra has been cited by the Court in cases involving an anti-trust action; a Labor Management Relations Act suit; and an action under the Trading with the Enemy Act. *Burnett* has been cited by the Courts of Appeals in cases involving action for wrongful death; an anti-trust suit; Tucker Act action; False Claims Act action; Death on the High Seas Act action; Longshoremen's and Harbor Workers' Act action; fraudulent misrepresentation action; and an United States Military Reservation automobile accident action. *Burnett* has been cited by the District Courts in suits involving an action concerning an accident on the high seas; a Jones Act seaman's suit; a patent infringement suit; a feed storage apparatus suit; a suit concerning Government contract redetermination proceedings; a diversity action; and a stockholder's suit.

This petition for certiorari raises the question whether *Burnett* is applicable to

a Tucker Act District Court suit. The application of the tolling principle of *Burnett* is an important and substantial question which should be decided by the Court.

Accordingly it is respectfully requested that the writ of certiorari prayed for be granted.

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